

capacity systems that provide 54 or more channels.<sup>45</sup> Moreover, fiber optics, digital signal compression, and a host of other technological advances promise to allow cable systems (not to mention telephone video providers) to offer hundreds of channels in the foreseeable future. The sheer number of current channels, and the likelihood of substantial increases in channel capacity in the near future, has led to a tremendous increase in the number of programming options available to video consumers. At present, there are over 100 national and regional cable programming networks.<sup>46</sup> In the past ten years alone, the combined full-day audience of cable networks increased from an 11 percent share to a 30 percent share of television viewing hours.<sup>47</sup> In addition, virtually all cable systems offer public, educational and governmental ("PEG") channels, and many offer local cable news, educational, and public affairs programming as well. Moreover, many cable systems, hoping to augment their available content options, have begun to offer audio programming in direct competition with local radio broadcasters. For example, in Omaha, Nebraska, Cox

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<sup>45</sup> Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket 96-133, FCC 96-496 ¶¶ 16-17 (rel. Jan. 2, 1997).

<sup>46</sup> See id. at Appendix G, Tables 1-2. The Commission's Report lists 67 national programming services owned, in part, by cable operators and another 80 independently owned national programming services. See id.

<sup>47</sup> Id. ¶ 18. At the same time, the combined audience of the network affiliated, independent, and public broadcast television stations has decreased from an 87 percent share to a 72 percent share of television viewing hours. See id.

Communications offers consumers thirty-one channels of digital music as part of its cable television subscription package.<sup>48</sup>

**B. A Vast Array of New Multichannel Services and Competitive Video and Audio Alternatives Has Emerged to Provide Consumers with Even More Programming and Information Options.**

**1. Videocassettes, Wireless Cable, and SMATV Have Developed As Significant Alternative Information/Entertainment Providers.**

Apart from newspaper, radio, and broadcast and cable television, a number of alternative entertainment and information mechanisms not widespread or, in some cases, even in existence when the Commission first promulgated the newspaper/broadcast cross-ownership rules now foster vigorous competition among content providers. For example, videocassette sales and rental outlets now compete for consumers' entertainment dollars. About 80 percent of American households have VCRs, and videocassette rental and sales revenue in 1995 approached \$15 billion.<sup>49</sup> Moreover, advertisers are increasingly turning to videocassettes as a mechanism for disseminating product information or conducting product demonstrations in the privacy of consumers' homes. By contrast, in 1975 the home-video industry was non-existent.<sup>50</sup>

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<sup>48</sup> See Jim Minge, Digital Radio New Choice, The Omaha World-Herald, Mar. 2, 1996, at 53-SF.

<sup>49</sup> See The Kagan Media Index, at 14.

<sup>50</sup> See OPP Working Paper at 4008 (Table 1).

On another front, publishers and broadcasters face competition from recent multichannel service entrants such as satellite master antenna television ("SMATV") and wireless cable ("MMDS"). As of October 1996, SMATV systems served 900,000 homes, while wireless cable systems served an expanding base of one million customers nationwide.<sup>51</sup>

**2. Direct Broadcast Satellite Service Has Blossomed in Recent Years and Now Stands as a Significant Competitive Threat to the Cable Industry.**

The dramatic entry of DBS as an affordable television alternative is further evidence that the modern media bazaar is a highly-charged competitive environment. DBS systems offer subscribers dozens of high-quality digital channels for a monthly fee that is competitive with cable television rates.<sup>52</sup> Since their introduction just two years ago, consumers have purchased more than 3.5 million mini satellite dishes,<sup>53</sup> manufacturers have at times been unable to keep up with demand.<sup>54</sup> At present, five providers compete to offer consumers DBS programming: DirecTV Inc., U.S. Satellite

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<sup>51</sup> See The Kagan Media Index, at 8.

<sup>52</sup> See Doug Abrahms, Satellite Firms Dish Out TV Alternative to Cable, Wash. Times, Dec. 2, 1996, at D6.

<sup>53</sup> See Jim McConville & Harry A. Jessell, Competition From the Sky: The War for TV Homes is Heating Up as DBS Attempts to Win Over Cable's Subscribers, Broadcasting & Cable, Nov. 25, 1996, at 22.

<sup>54</sup> Doug Abrahms, Pizza-Sized Dish is the Hottest Item on Home Telecommunications Menu, Wash. Times, Feb. 4, 1995, at C1.

Broadcasting Corp., PrimeStar, EchoStar, and Alphastar.<sup>55</sup> One recent DBS entrant, EchoStar, which inaugurated service this past spring, has already enrolled 235,000 subscribers and boasts gains of 10,000 to 12,000 new customers per week.<sup>56</sup> The continued rapid development of the DBS industry ensures that yet another long-term alternative media voice will compete in the mass media marketplace.

**3. Satellite DARS Will Soon Enter the Marketplace  
and Provide a Multichannel Alternative to  
Conventional Radio Broadcasting.**

Satellite-based radio, still in its infancy, may soon deliver a digital line-up of thirty channels of news, music and entertainment, adding another voice to the highly competitive media fray. To date, four DARS applicants have sought Commission authorization to beam CD-quality sound to newly developed radio sets.<sup>57</sup> At least one applicant, Primosphere, has announced plans, should it obtain a license, to provide DARS service to customers free-of-charge, relying on advertising sales to generate

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<sup>55</sup> See Albert B. Crenshaw, Satellite TV Services: Choices Can be Numbing, Wash. Post, Nov. 24, 1996, at H1.

<sup>56</sup> See McConville, supra note 53, at 22, 24.

<sup>57</sup> CD Radio, Inc., Primosphere L.P., Digital Satellite Broadcasting Corp., and American Mobile Radio Corp. all have filed applications to offer DARS service. See FCC Proposes Rules for DARS Service; Spectrum Auction on the Way, Satellite News, Nov. 18, 1996.

revenue.<sup>58</sup> More recently, an FCC advisory panel recommendation set the stage for a spectrum auction slated for mid-April of 1997.<sup>59</sup>

#### **4. Telco Entry Into Video Programming May Soon Transform the Marketplace.**

When the Telecommunications Act of 1996 was signed into law, it brought an end to the long-standing telco/cable cross-ownership ban. Under the new statutory regime, telephone companies can now actively compete in the video programming marketplace within their local service areas. In eliminating the telco/cable cross-ownership ban, Congress provided local exchange carriers ("LECs") with the option of offering video programming by operating a cable system, via wireless microwave-based cable technology, or by establishing an Open Video System.<sup>60</sup>

Already, LECs are enthusiastically embracing the opportunity to establish a new media voice. For example, Ameritech has obtained more than two dozen local cable television franchises and plans to build state-of-the-art systems to provide consumers with a competitive choice.<sup>61</sup> Another LEC, Pacific Bell, is anticipating a rollout of a

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<sup>58</sup> See id.

<sup>59</sup> See Auction Expected Soon; Panel Denies Pioneer's Preference to DARS Applicants, Comm. Daily, Nov. 20, 1996, at 4.

<sup>60</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, § 302, 110 Stat. 56, 114 (amending §§ 651(a)(3) (Cable Systems), 651(a)(1) (Wireless Cable), 653 (Open Video Systems) of the Communications Act of 1934)).

<sup>61</sup> See Briefly Noted: Ameritech Corp's Ameritech New Media Unit, Interactive Video News, Oct. 14, 1996; Thomas P. Cohan, Cable Competition: The Key to Consumer Choice, Nation's Cities Weekly, Vol. 19, No. 44, Nov. 4, 1996, at 2.

commercial digital wireless cable system in the Los Angeles area by early 1997.<sup>62</sup> Also, one local exchange carrier, Bell Atlantic-New Jersey, Inc., has obtained FCC approval to operate an Open Video System in Dover Township, New Jersey.<sup>63</sup> The long-term effect of telco entry, as intended by Congress, will be to foster the growth of new voices in the media marketplace while offering ever-increasing information and entertainment alternatives to consumers.

**5.     The Internet Has Emerged Virtually Overnight  
as a Major Information/Entertainment/Advertising  
Alternative.**

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Perhaps more than any other recent development, the emergence of the Internet, and its user-friendly interface known as the "world-wide web," holds the promise of universal access to virtually limitless sources of information. Worldwide computer networking for the average consumer via the Internet simply did not exist even a few years ago, let alone when the Commission first promulgated the newspaper/broadcast cross-ownership ban. But today, between twenty-five and forty million Americans are "on-line" via direct connections to the Internet,<sup>64</sup> with millions gaining access via nation-wide on-line computer networking services such as America Online,

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<sup>62</sup> Brad Smith, PacTel Sees Video's Future as Wireless, *Broadcasting & Cable*, Vol. 126, No. 29, July 8, 1996, at 36.

<sup>63</sup> Bell Atlantic-New Jersey, Inc. Certification to Operate an Open Video System, 11 FCC Rcd 13249 (1996).

<sup>64</sup> See Edward Epstein, Internet Alters Art of Campaigning, *S.F. Chronicle*, Oct. 14, 1996, at A7.

CompuServe, and Prodigy.<sup>65</sup> The Internet is an ideal medium through which to communicate both with members of the local community and with a broader national, and even worldwide, audience.

Already, the Internet has made substantial inroads as a mechanism for amplifying political debate. Following last year's election, approximately 8.5 million voters said that information they obtained on the Internet influenced their vote.<sup>66</sup> In addition, Internet-based offerings from non-traditional media entities have recently sprouted up. One example is Slate, a magazine published by software manufacturer Microsoft which has former CNN pundit Michael Kinsley at its editor's desk.<sup>67</sup> Another original content provider is NetRadio Network, a 24-hour Internet radio network that creates customized programming for users based on their personal profiles.<sup>68</sup>

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<sup>65</sup> See Doug Abrahms, AOL Often AWOL, But Users Aren't Deserting: Net's Gains Seen as Encroaching on TV, Wash. Times, Jan. 27, 1997, at A1.

<sup>66</sup> See Rajiv Chandrasekaran, Politics Finding a Home on the Net; Post-Election Surveys Show the Web Gains Influence Among Voters, Wash. Post, Nov. 22, 1996, at A4.

<sup>67</sup> Charles Waltner, In Web Years, Kinsley is Nearly a Veteran Now: After 4 Months Online, Slate's Editor Has Faith in the Medium, If Not Proof, Advertising Age, Nov. 4, 1996, at S18. Newspaper publishers also are utilizing the Internet as an additional outlet for providing news and information to the public. More than 230 North American daily newspapers have launched on-line services ranging from web sites to services with consumer on-line companies and local bulletin boards. NAA Facts About Newspapers at 12.

<sup>68</sup> See Kate Maddox, Web Business Advances to Next Stage -- Customized Content With Adaptive Response Capabilities Shores Up Electronic Commerce, CommunicationsWeek, Sept. 30, 1996, at 53. In fact, 846 radio stations already have sites on the Internet. See Broadcasting & Cable Yearbook 1996 at B-673 - B-688.

Enhanced computer networking capabilities, such as real-time audio and video feeds, made possible by new high-speed Internet connections, promise to furnish consumers with even greater access to additional information alternatives from this burgeoning new medium. One high-speed access option, Integrated Services Digital Network ("ISDN"), which utilizes existing copper telephone plant, had 450,000 lines operating at the end of 1995 with expectations of 800,000 users on-line by the end of 1996.<sup>69</sup> Another high-speed approach, a satellite-based Internet transmission system now available nationwide, utilizes a 21-inch satellite dish to receive Internet downloads at speeds up to fourteen times faster than traditional telephone modems.<sup>70</sup> Meanwhile, cable operators, anxious to participate in the Internet revolution, are beginning to roll out high-speed networks using coaxial cable-based modems in several U.S. cities.<sup>71</sup> As new technological pipelines are deployed, and as the computer-based information services industry matures, consumers will reap the benefits of expanded access to community, local, regional, and national news, political discussion, civic discourse, and other information resources.

Recent efforts by the White House promise to ensure the long-term viability of the Internet as a mass-communications medium. Recognizing the potential educational

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<sup>69</sup> See Room for All; ISDN, Cable Modems and DSS Compete for Retail Dollars, Comm. Daily, Mar. 29, 1996, at 5.

<sup>70</sup> See Satellite 'Net Access Offers Interim Broadband Solution, Internet Week, Nov. 25, 1996.

<sup>71</sup> See Cox, Cablevision Systems Launching Cable Modem Services, Media Daily, Sept. 13, 1996; Cathy Taylor, Key to the Highway: At Long Last, Cable Modem Rollout Begins from TCI, Time Warner; Tele-Communications Inc., MEDIAWEEK, Sept. 9, 1996, at 5.



value of high-speed access, President Clinton has urged both the Commission and the communications industry to connect every school and library in the nation to the Internet.<sup>72</sup> Additionally, the President has called for \$100 million in Federal funds to enhance the speed and capacity of the Internet.<sup>73</sup>

**C. Outlets for Local and National News are Blossoming as the Media Increasingly Target Local Audiences and Specialized Information Needs.**

In addition to the growth in the number and variety of media outlets since the newspaper/broadcast cross-ownership rules were adopted, there has been a proliferation of local, regional, and national news programming. For example, as noted above, "talk radio" has become an increasingly prominent force in the development of a rigorous, robust forum for political discourse, as have other "civic-minded" radio formats such as news/talk, public affairs, and educational programming.<sup>74</sup>

Similarly, local newspapers -- often published with a suburban or ethnic<sup>75</sup> bent -- today provide a rich resource for readers concerned with community affairs and local politics. These and countless other regional newspapers emphasize community-oriented reporting. One executive, who manages twenty-one local newspapers for the New

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<sup>72</sup> See Jube Shriver, Jr., FCC Urged to Require Wiring of Schools, Libraries for Info Age Policy, L.A. Times, Oct. 11, 1996, at D2.

<sup>73</sup> See id.

<sup>74</sup> See supra Section III.A.1. (discussing popularity of newer radio format options).

<sup>75</sup> For example, currently on the nation's newsstands are some twenty Russian-language and over sixty Vietnamese-language newspapers. See Elizabeth Gleick, Read All About It, Time, Oct. 21, 1996, at 66, 69.

York Times Co., recently delivered the forecast for regional newspapers, proclaiming that "[t]he future is local, local, local, and nobody is going to out-local us."<sup>76</sup>

Americans also have benefitted in recent years from the development of several successful national news media outlets. USA Today has emerged as a national newspaper, successfully competing with other longer-established papers such as The Wall Street Journal<sup>77</sup> and New York Times. In television news, CNN has successfully developed an all-news format which has been mimicked at the local level both by television broadcasters and by cable system operators. In addition, a number of competitive entrants at the national level, specifically MSNBC and the Fox News Channel, now threaten to challenge CNN's dominance in the cable television news programming field.<sup>78</sup> There can be little doubt, then, that in the past two decades American consumers have been the beneficiaries of an abundant and ever-expanding array of local, regional, and national news and information sources.

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<sup>76</sup> Id.

<sup>77</sup> The Commission has determined that national newspapers such as USA Today and The Wall Street Journal are not subject to the cross-ownership restriction. See Stockholders of CBS Inc., 11 FCC Rcd 3733, 3779 (1995); Gannett Co., Inc., 102 FCC2d 1263, 1266 (1986).

<sup>78</sup> See Richard Zoglin, The News Wars: On TV and Radio, in Print and Over the Internet, News is Everywhere. But Are We Better Informed or Just Overwhelmed?, Time, Oct. 21, 1996, at 58, 60.

**D. Broadcasters and Newspaper Publishers Face Additional Competitive Pressures from a Wide Variety of Non-Media Sources.**

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The variety of media and non-media sources competing for advertising dollars eliminates any danger of undue concentration in the economic marketplace should the newspaper/broadcast cross-ownership restrictions be relaxed. For example, direct mail advertising has grown at an exponential rate and now closely rivals total daily newspaper advertising. Expenditures on direct mail in 1995 were nearly \$33 billion, or 20.4 percent of all advertising expenditures, and nearly three times the amount spent on radio ads.<sup>79</sup> Magazine sales, particularly by increasingly popular city, regional, and specialty publications, also have eroded newspapers' share of advertising revenues while providing additional sources of information and opinion. Magazines now generate \$11.5 billion annually in advertising revenues,<sup>80</sup> and account for 5.4 percent of all advertising expenditures.<sup>81</sup>

Other competitors for advertising dollars include shoppers, pennysavers, bus and cinema advertising, which, along with other "miscellaneous" advertising vehicles, brought in over \$20 billion in advertising revenues in 1995, or 12.6 percent of the national total.<sup>82</sup> Yellow pages and outdoor advertising also provide very substantial competition for advertising revenues, together accounting for 7.2 percent of 1995 ad

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<sup>79</sup> See NAA Facts About Newspapers at 10.

<sup>80</sup> See The Kagan Media Index, at 15.

<sup>81</sup> See NAA Facts About Newspapers at 10.

<sup>82</sup> See id.

revenues.<sup>83</sup> Current advertising revenue figures do not include the use of the Internet for advertising purposes. The Internet, however, offers virtually limitless possibilities for reaching either broad or very specialized audiences with information on products and services.

**IV. PERPETUATION OF THE ANACHRONISTIC NEWSPAPER/  
BROADCAST CROSS-OWNERSHIP BAN UNFAIRLY  
DISCRIMINATES AGAINST PUBLISHERS AND  
STATION OWNERS, FAILS TO ADVANCE LEGITIMATE  
DIVERSITY CONCERNS, AND UNNECESSARILY BURDENS  
FUNDAMENTAL FIRST AMENDMENT INTERESTS.**

**A. The Newspaper/Broadcast Cross-Ownership  
Restrictions Unfairly Single Out Newspaper  
Publishers and Broadcast Station Licensees,  
Who Are Denied the Opportunity to Take  
Advantage of Operational Synergies and  
Economies While Their Competitors Are Free  
to Pursue Advantageous Cross-Media Relationships.**

As demonstrated in the preceding section, daily newspaper publishers and over-the-air broadcasters compete today in a technologically advanced and highly diverse marketplace for information, opinion, entertainment, and advertising that was

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<sup>83</sup> See *id.* In its *Notice of Inquiry*, the Commission observes that "local newspapers captured 49% of local advertising expenditures (20.1% of all advertising) as against a total of 13.3% of local advertising (5.5% of all advertising) captured by radio stations." 11 FCC Rcd at 13014 (citation omitted). Those figures, however, fail to distinguish between local retail and classified advertising. According to figures compiled by the NAA, 1995 classified advertising expenditures totaled \$13.7 billion (8.5% of total expenditures), while retail ad revenues represented \$18.1 billion (11.2%) for daily newspapers. *NAA Facts About Newspapers* at 10. Moreover, neither the NAA figures nor the McCann-Erickson data cited by the Commission include separate "local" ad figures for many media, e.g., magazines, direct mail, business papers, or farm publications.

unimaginable when the Commission determined, more than twenty years ago, to foreclose future newspaper/broadcast cross-ownership. Moreover, newspapers and broadcast station owners are virtually alone among the major information providers in facing an absolute governmental barrier to common ownership.

Indeed, unlike cable system operators and programmers, DBS, SMATV, and wireless cable service providers, local and long distance telcos, on-line services (e.g., America On Line, Prodigy), software providers (e.g., Microsoft), magazine publishers, and direct mailers, only broadcasters are restricted from publishing a newspaper. Moreover, while newspaper/broadcast combinations are banned, countless other cross-ownerships are entirely permissible, including the following:

- cable/radio
- cable "clustering" (ownership of multiple systems in adjacent areas)
- MMDS/broadcast
- MMDS/telco
- on-line services (America On Line, Prodigy)/cable
- on-line services/telco
- on-line services/broadcast
- software providers (Microsoft)/cable
- software providers/telco
- software providers/broadcast
- telco/broadcast
- telco/DBS

- DBS/broadcast

Further, in the years since the newspaper/broadcast cross-ownership restriction was adopted, the Commission, in some cases at the specific direction of Congress, has eliminated or substantially relaxed almost all of its other broadcast ownership limitations. For example, as the Commission recites in its Notice of Inquiry, "radio ownership limitations have been amended from allowing common ownership of only a single AM and single FM radio station in the same market to the current regulatory regime in which, depending on the number of voices in a market, as many as eight radio stations . . . may be commonly owned."<sup>84</sup> In addition, the Commission first raised and, at Congress' direction, ultimately eliminated the numerical limitations on both radio station and television station ownership, and raised the national television audience share cap from 25 percent to 35 percent.<sup>85</sup>

Similarly, the one-to-a-market rule already has been substantially relaxed, and the Commission is now considering its further relaxation or elimination. Thus, in 1989, the Commission adopted its current "Top 25/30 voices" presumptive waiver standard.<sup>86</sup> In addition, under the "case by case" standard, the FCC now routinely

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<sup>84</sup> Notice of Inquiry, 11 FCC Rcd at 13009.

<sup>85</sup> Broadcast Radio Ownership, FCC 96-90 (rel. Mar. 8, 1996) (eliminating limitations on national radio ownership); Broadcast Television Ownership, FCC 96-91 (rel. Mar. 8, 1996) (eliminating numerical restriction on national television ownership and raising audience reach limit to 35 percent).

<sup>86</sup> Second Report and Order in MM Docket No. 87-7 (Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules), 4 FCC Rcd 1741 (1989) ("1989 One-to-a-Market Decision"), recon. granted in part and denied in part, 4 FCC Rcd 6489 (1989).

allows common ownership of a television station and as many as four radio stations in the same market.<sup>87</sup> Congress, in the Telecommunications Act of 1996, expressly directed the Commission to extend its waiver policies to the Top 50 markets,<sup>88</sup> and the agency is considering how to implement that directive as well as whether it should eliminate the one-to-a-market rule entirely or further relax it in application through an expanded presumptive waiver policy.<sup>89</sup>

The pending television rulemaking proceeding also looks toward the relaxation of the television duopoly rule (from a Grade B overlap standard to "Grade A plus DMA") and asks whether and under what circumstances the Commission should permit common ownership of two television stations in the same market.<sup>90</sup> Finally, Congress in the Telecommunications Act of 1996 repealed the statutory ban on local television/cable cross-ownership, leaving the FCC free to consider elimination of that rule, and directed the Commission to review all of its media ownership regulations

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<sup>87</sup> See, e.g., BREM Broadcasting, 9 FCC Rcd 1333 (1994) (TV/2AM/2FM in Pensacola, FL/Mobile, AL); Louis C. DeArias, Receiver, 11 FCC Rcd 3662 (1996) (TV/2AM/2FM in Spokane, WA).

<sup>88</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(d), 110 Stat. 56, 111 (1996).

<sup>89</sup> See Second Further Notice of Proposed Rule Making in MM Docket Nos. 91-221 and 87-8 (Review of the Commission's Regulations Governing Television Broadcasting), FCC 96-438, ¶¶ 59-79 (rel. Nov. 7, 1996) ("Review of Television Broadcasting Regulations").

<sup>90</sup> See id. ¶¶ 29-58.

biennially to determine whether they remain necessary.<sup>91</sup> That directive includes, of course, the newspaper/broadcast cross-ownership restrictions.<sup>92</sup>

NAA submits that the Commission should take advantage of this opportunity to give broadcasters and newspaper publishers the freedom to continue to compete effectively with cable and other multichannel providers, as well as with new print and computerized sources of news, information, and entertainment. Relief from the outdated cross-ownership restriction will not only help preserve broadcast stations and newspapers as viable voices, but will spur their evolution into more diversified and innovative competitors in today's technologically advanced multimedia marketplace.

**B. The Newspaper/Broadcast Cross-Ownership Ban Has in Fact Failed to Promote Diversity.**

As discussed above, the Commission promulgated the newspaper/broadcast cross-ownership rule with the "hope" of promoting diversity. After two decades of experience under the restriction, however, the evidence indicates that the rule has served not to further, but to undermine that goal.

Indeed, in granting the Commission's consent to a permanent waiver of the rule to allow Rupert Murdoch to control both a daily newspaper and a television station in New York City, Commissioners Quello and Duggan both observed that the cross-

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<sup>91</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 111-12 (1996).

<sup>92</sup> As indicated in the Notice of Inquiry, the former restriction on repealing or reexamining the rule is no longer contained in the FCC's appropriations legislation. 11 FCC Rcd at 13006-07, n.20.



ownership rule, by excluding local broadcast station owners as prospective buyers, had contributed to the demise of the Washington Star.<sup>93</sup> As Commissioner Duggan aptly noted, that result certainly was "[n]o victory for media diversity."<sup>94</sup> The Washington Star was not, unfortunately, an isolated example. Between 1988 and 1993, at least 115 daily newspapers failed throughout the United States.<sup>95</sup> At least some of those papers might well have survived had local broadcasters been eligible to acquire struggling dailies in their home communities.

As noted above, evidence compiled by the Commission itself in the proceeding in which it adopted the restriction indicated that newspaper/broadcast cross-ownership fosters better local newsgathering and public affairs programming.<sup>96</sup> Ironically, then, the combinations banned by the Commission were shown to have done a better job of creating local non-entertainment, informational programming -- the type of programming at the very core of the Commission's diversity concerns -- than non-commonly owned stations.

This result, NAA submits, is not surprising; the Commission reached similar conclusions when it was considering whether to modify the one-to-a-market rule. There, the Commission determined that group ownership of broadcast stations enhances

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<sup>93</sup> See Fox Television Stations Inc., 8 FCC Rcd 5341, 5369 (1993) (Separate Statement of Commissioner Duggan).

<sup>94</sup> Id.

<sup>95</sup> See Fox Television Stations Inc., 9 FCC Rcd 5246, 5249 n.10 (1994) (Separate Statement of Chairman James H. Quello) (Erratum).

<sup>96</sup> See Second Report and Order, 50 FCC2d at 1078, n.26.

the availability of informational programming.<sup>97</sup> Indeed, the Commission has concluded that group-ownership may also "enhance the quality of viewpoint diversity by enabling such stations to invest additional resources in programming and other service benefits provided to the public."<sup>98</sup>

There is no reason to believe that future newspaper/broadcast cross-owners would not provide excellent service to the public. Indeed, it only stands to reason that a newspaper dedicated to covering the issues and events affecting its local community would be equally committed to providing local news and programming over a commonly-owned broadcast facility. Co-owners of multiple media outlets, moreover, have a strong economic incentive to differentiate the "products" offered on those outlets, in order to tap additional audiences or subscribership and maximize the overall reach of the commonly-owned facilities.<sup>99</sup>

In sum, not only would elimination of the newspaper/broadcast cross-ownership rule help to enhance overall diversity by enabling more troubled local daily newspapers or stations to survive, but it would also help to achieve the Commission's goal of increasing the amount and improving the quality of news, public affairs, and local programming on radio and television broadcast stations.

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<sup>97</sup> 1989 One-to-a-Market Decision, 4 FCC Rcd at 1748. The FCC has noted repeatedly that "combinational efficiencies derived from common ownership of radio and television stations in local broadcast markets and from common ownership of same service radio stations in local markets [are] presumptively beneficial and would strengthen the competitive standing of combined stations." Golden West Broadcasters, 10 FCC Rcd 2081, 2084 (1995) (TV/FM/2 AM).

<sup>98</sup> Golden West Broadcasters, 10 FCC Rcd at 2084.

<sup>99</sup> See infra Section IV.C.1.

**C. Given the Explosion in the Number of Media Outlets and the Courts' More Recent Scrutiny of Policies that Restrict Commercial Speech, the Newspaper/Broadcast Cross-Ownership Policy Is No Longer Supportable.**

Nearly two decades ago, the FCC's newspaper/broadcast cross-ownership rule was sustained against a First Amendment challenge by the Supreme Court in FCC v. NCCB, in which the Court held that the restriction was a rational means of promoting diversity in the mass media. As demonstrated in Section III above, however, the information marketplace in which newspapers and broadcast stations compete has changed dramatically since the Supreme Court's 1978 decision. The number of broadcast stations has increased greatly, along with the availability of a wide variety of alternative sources of information/entertainment and competing advertising outlets. Conversely, the number of independent daily newspapers has declined significantly.

Given these radical changes in the marketplace, NAA submits, the newspaper/broadcast cross-ownership ban is no longer justifiable.<sup>100</sup> Moreover, recent judicial actions such as those striking down the cable/telco ban<sup>101</sup> and the ban on alcohol price advertising<sup>102</sup> strongly suggest that the courts today would require a

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<sup>100</sup> Cf. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) ("Syracuse Peace Council"), cert. denied 493 U.S. 1019 (1990) (Court suggested that continued enforcement of the Fairness Doctrine may be arbitrary and capricious due to First Amendment infirmities).

<sup>101</sup> Chesapeake & Potomac Telephone Co. v. U.S., 42 F.3d 181 (4th Cir. 1994) ("C & P v. U.S."), vacated and remanded sub nom., United States v. C & P, 116 S. Ct. 1036 (1996).

<sup>102</sup> 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

far stronger showing than was made in 1975 to support such a direct limitation on the free speech rights of a particular class of citizens. This dramatically changed environment demands, and the NAA strongly urges, that the Commission reassess not only the continued need for the policy but also its validity under appropriate First Amendment scrutiny.

**1. The Original Rationale for the Policy Is No Longer Valid in Today's Highly Competitive Multimedia Marketplace.**

In adopting the rule in its 1975 Second Report and Order, the Commission stated that its primary concern was to promote diversity in broadcast voices.<sup>103</sup> Noting that its diversification policy is derived from both the First Amendment and economic sources, the Commission determined that "requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices."<sup>104</sup> Despite the absence of any hard evidence in support of its position, the Commission adopted a prospective ban on newspaper-broadcast cross-ownership combinations and required divestiture in "egregious" cases where existing combinations were deemed to be effective monopolies.

The prospective ban and limited divestiture requirement were eventually upheld by the Supreme Court in FCC v. NCCB.<sup>105</sup> As the Supreme Court noted, there was

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<sup>103</sup> 50 FCC2d at 1074.

<sup>104</sup> Id. at 1049.

<sup>105</sup> 436 U.S. 775 (1978), overturning Nat'l Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977) (in which the D.C. Circuit had found that the  
(continued...)

little, if any, evidence of the exercise of market power (i.e., abuses such as maintaining artificially high advertising rates) by owners of co-located newspaper and broadcast stations.<sup>106</sup> The Court, however, determined that the Commission "was entitled to rely on its judgment, based on experience, that 'it is unrealistic to expect true diversity from a commonly owned station-newspaper combination.'"<sup>107</sup>

Whatever merit the cross-ownership ban may have had two decades ago, it cannot be seriously disputed that the dramatic increase in the number of competing media and advertising outlets since 1975 has eroded the original justification for the policy. The meteoric rise in the number and variety of available voices in today's information marketplace, detailed in Section III above, compels the Commission to reevaluate this outmoded regulatory policy, which continues to single out newspaper publishers as ineligible -- as a class -- to hold licenses for broadcast stations in their local markets. In fact, the FCC has repeatedly recognized the change in the level of competition in the mass media field in its decisions eliminating or substantially relaxing most of its other media ownership rules.<sup>108</sup> Moreover, the Commission has expressly

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<sup>105</sup>(...continued)  
Commission erred in limiting the divestiture requirement to the so-called "egregious" cases).

<sup>106</sup> Id. at 786 ("In the Commission's view, . . . no pattern of specific abuses by existing cross-owners was demonstrated.").

<sup>107</sup> Id. at 776.

<sup>108</sup> See, e.g., Memorandum Opinion and Order and Further Notice of Proposed Rulemaking (Revision of Radio Rules and Policies), 7 FCC Rcd 6387 (1992) ("1992 Revision of Radio Rules") (noting "the dramatic increase in competition and diversity in the radio industry over the last decade" as basis for relaxation of radio ownership rules).

questioned the continuing validity of the notion, underlying the newspaper rule, that governmentally mandating a larger number of station owners necessarily results in greater diversity.<sup>109</sup>

Accordingly, as it was directed to do in Syracuse Peace Council (FCC on remand required to reevaluate the constitutionality of its policy), the Commission should carefully reevaluate the constitutionality of the anachronistic newspaper/broadcast cross-ownership policy.<sup>110</sup> Failure to reexamine this issue in light of the changed factual circumstances over the past two decades, NAA submits, would be patently unfair to newspaper publishers, who continue to be denied the regulatory relief that has been granted by Congress and the Commission to virtually every other media player.

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<sup>109</sup> In other proceedings, the FCC has cited studies that indicate that a monopolist would have the incentive to air diverse programming to generate the largest collective audience, in contrast to the Commission's previous view that "51 stations provide more diversity than 50." Further Notice of Proposed Rule Making (Review of the Commission's Regulations Governing Television Broadcasting), 10 FCC Rcd 3524, 3550-3551 (1995) ("But where one party owned all the stations in a market, its strategy would likely be to put on a sufficiently varied programming menu in each time slot to appeal to all substantial interests.") Id. (citation omitted). See also Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 2771-72 (1992) ("In addition, commentators tend to agree with the Notice that greater combination will not harm diversity because, while competing stations might try to reach the same core audience, a single owner might try to program different stations to appeal to different audience segments in order to maximize its total audience size."); 1992 Revision of Radio Rules, 7 FCC Rcd at 6389 ("[T]he Commission concluded that relaxation of the national caps may actually enhance the quality of viewpoint diversity, as economies of scale from group ownership provide additional resources to invest in programming.").

<sup>110</sup> 867 F.2d at 656 ("an agency could not blind itself to a constitutional defense to a 'self-generated' policy") (citation omitted).

**2. Under the Courts' Recent Application of an "Intermediate" Scrutiny Test to Restrictions on Commercial Speech, the Commission's Newspaper/Broadcast Policy Could Not Be Sustained.**

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In addition to the recent changes in the communications marketplace, the Commission should note that First Amendment jurisprudence also has evolved considerably since 1978. The courts have grown increasingly skeptical of limitations on speech that are employed to accomplish non-speech related goals such as the protection of competition. For example, in C & P v. U.S.,<sup>111</sup> the Fourth Circuit found a similar provision, the cable/telco cross-ownership ban, unconstitutional. In so doing, the court first reaffirmed that cable television service is a form of "speech" protected by the First Amendment. Because the cross-ownership provision impaired a telephone company's ability to engage in this form of protected speech, it was found to infringe upon the company's First Amendment rights. The court concluded that the restriction should be subject to intermediate scrutiny -- i.e., that the restriction must be shown to advance a substantial governmental interest in a narrowly tailored manner.<sup>112</sup> The Fourth Circuit agreed with the United States that the government had

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<sup>111</sup> 42 F.3d 181.

<sup>112</sup> The Fourth Circuit observed that the restriction was not a direct regulation of broadcast frequencies, and that there was no physical limitation on the number of channels that a cable system can support. The Court concluded that, without such a concern for scarce resources, the regulation must be subject to more than minimal scrutiny.

In the past, broadcast regulations have been subject to a lesser degree of constitutional scrutiny based on the notion that the scarcity of broadcast frequencies  
(continued...)

a significant interest in (1) preventing telephone companies from discriminating against non-affiliated cable companies in the use of either telephone poles or telephone wires; and (2) preserving diversity in the market of electronic access (i.e., preserving the availability of two wires to every home). The court concluded, however, that the prohibition against local telephone companies offering cable television service was not narrowly tailored to serve the stated purposes.

On the contrary, the court concluded that there were simpler and more efficient means of guaranteeing cable companies access to telephone poles and wires. For example, Congress could have limited telephone companies' editorial control over video programming to a fixed percentage of the channels available, and required them to lease the remaining channels to other video programmers. Further, the court pointed out that the legislation did not prevent cross-subsidization from one monopolized industry to another, as telephone companies were still free to enter the video delivery service market. Finally, the court concluded that the restrictive provisions did not

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<sup>112</sup>(...continued)  
allowed a larger role for government regulation. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969). The media world has changed so dramatically, however, that the original spectrum scarcity rationale that underlies the Red Lion doctrine may no longer justify a lower level of judicial scrutiny for broadcast regulation than for other forms of media. In fact, more than a decade ago, the Supreme Court recognized that new technology such as "cable and satellite television" -- and the resulting access to diverse programming that communities have -- may render the scarcity doctrine "obsolete." Fed. Communications Comm'n. v. League of Women Voters of California, 468 U.S. 364, 376-77, n.11 (1984). See also News America Publ'g., Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) ("The Supreme Court ... has recognized that new technology may render the [broadcast scarcity rationale] obsolete -- indeed, may have already done so.").



provide telephone companies with sufficient alternative means of communication.

Although the government argued that telephone companies still would be able to sell their programs to other cable systems or TV stations, the court rejected this contention. Unlike other video programmers, a telephone company cannot guarantee that its programming will reach the desired audience. The court concluded that, to the extent that telephone companies would be forced to rely upon other local broadcasters and cable operators for distribution, the restriction unconstitutionally regulated a telephone companies' ability to compete in the video programming market.

Similarly, the Supreme Court recently invalidated a ban on liquor advertising that had the effect of increasing prices.<sup>113</sup> Applying an intermediate scrutiny test, the Court struck down Rhode Island's ban on all advertising of alcoholic beverage prices outside liquor stores as broader than necessary to accomplish the state's goal of lowering alcohol consumption. The Court held that there were less restrictive means of accomplishing the government's goal that did not limit speech, such as the imposition of a price floor.

In fact, the Supreme Court often has struck down restrictions on commercial speech as insufficiently narrowly tailored. For example, last year the Court held unconstitutional a federal law prohibiting beer labels from displaying alcohol content, noting that many alternatives were available that "could advance the Government's

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<sup>113</sup> See 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495.